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No. 08-

IN THE
Supreme Court of the United States

JEFFREY R. PURTELL and VICKI A. PURTELL,

Petitioners,

v.

BRUCE MASON, in his individual capacity,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether qualified immunity insulates a police officer from liability for arresting someone in order to coerce him to remove constitutionally protected speech on signs in his front yard facing the public sidewalk where the defense was that the speech was "fighting words," and the speech in question was not directed to "the person" of the individual whom the speech was about, but rather was directed to the public?

PARTIES TO THE PROCEEDINGS

The names of all parties to the proceedings before the United States Court of Appeals for the Seventh Circuit appear in the caption of the case.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioners, Jeffrey R. Purtell and Vicki A. Purtell, respectfully request that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 527 F.3d 615 and is reprinted at pages 1a-27a of the Petitioners' Appendix. The post-trial memorandum opinion and order of the United States District Court for the Northern District of Illinois, Eastern Division, is not published but can be found at 2006 WL 2037254 (N.D. Ill.) and is reprinted at pages 28a-41a of the Petitioners' Appendix. The pretrial memorandum opinion and order of the United States District Court for the Northern District of Illinois, Eastern Division, is reported at 412 F. Supp. 2d 903 (N.D. Ill. 2006) and is reprinted at pages 45a-63a of the Petitioners' Appendix. The order of the United States District Court for the Northern District of Illinois, Eastern Division, denying the Purtells' motion for reconsideration of the pretrial memorandum opinion and order is not reported but is reprinted at pages 42a-44a of the Petitioners' Appendix.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on May 14, 2008. No petition for rehearing was filed.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

(1) The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

(2) 42 U.S.C. § 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

I. Statement of Facts.

Jeffrey and Vicki Purtell, husband and wife, lived with their family in a suburb of Chicago called Bloomingdale. A public controversy arose after the Purtells, as a result of financial difficulties, began parking their recreational vehicle on the driveway of their home. The public controversy became a political one when some of the Purtells' neighbors organized a petition drive urging the Village of Bloomingdale to adopt an ordinance banning homeowners from storing RVs on their property.

While the proposed ordinance was under consideration by the Village Board, the Halloween season of 2002 was approaching. In keeping with the season, in mid-October the Purtells put together a display of faux tombstones on their front yard facing the sidewalk in front of their home. The faux tombstones served a dual purpose in that they were Halloween decorations, and they constituted a protest against the proponents or supporters of the proposed RV ordinance. Five of the six tombstones referred to a proponent or supporter of the RV ordinance by his or her first name, or a variant of his or her first name, and each of the tombstones included an epitaph in the form of satirical doggerel. For example, the "Jimmy" tombstone read as follows:

> "Here Lies Jimmy,
> The OlDe Towne IDioT.
> MeAn As sin even withouT his Gin.
> No LonGer Does he wear
> That sTupiD Old Grin . . .
> Oh no, noT where
> they've sent Him!
> ~1690~"

The date of death on the faux tombstones consisted of the address of the proponent or supporter of the proposed ordinance who was being lampooned in the epitaph plus one additional digit. The epitaphs on all of the tombstones are set forth in the opinion of the Court of Appeals for the Seventh Circuit. (Petitioners' Appendix, 6a-8a.)

On October 18, 2002, several of the neighbors who were being lampooned in the tombstones called the police to complain. The police went out to the Purtells' house and attempted to persuade them to take the tombstones down. The Purtells refused but agreed to cover the names on the tombstones with duct tape.

On November 6, 2002, when the duct tape covering the name on the "Jimmy" tombstone had fallen off or been removed, the gendarmes of the Village of Bloomingdale were called once again, and Officer Bruce Mason and another officer responded to the neighborhood. The officers first spoke with some of the Purtells' neighbors, and then went over to the Purtells' residence. Jeffrey Purtell agreed to reapply the duct tape to the "Jimmy" tombstone, and exited his home to do so. Shortly thereafter, an argument arose on the Purtells' front yard. During the argument, Robert Lesner, the husband of one of the persons lampooned on a tombstone, and an off-duty DuPage County Deputy Sheriff, chest-butted Jeffrey Purtell. Officer Mason told Jeffrey Purtell if he would not agree to take down the tombstones, he would be arrested. Jeffrey Purtell refused to take them down and was handcuffed. Jeffrey Purtell then told Officer Mason that he would rather take down the tombstones than be arrested,

and Officer Mason agreed that he would not go forward with the arrest if Jeffrey Purtell would take down the tombstones. Officer Mason then removed the handcuffs, and Jeffrey Purtell dismantled the "tombstone" display.

II. Proceedings Below.

The Purtells brought an action against Officer Mason under 42 U.S.C. § 1983 alleging, among other things, that Officer Mason abridged the Purtells' right to freedom of speech under the First Amendment to the United States Constitution. The basis for federal jurisdiction in the court of first instance was 28 U.S.C. § 1331. Officer Mason defended the action on the bases that the speech on the tombstones was "fighting words" unprotected by the First Amendment of the United States Constitution, and that, even if the speech was not "fighting words," he should be insulated from liability under the doctrine of qualified immunity. The district court denied Officer Mason's motion for summary judgment as to the First Amendment claim, and the matter proceeded to a trial by jury on the issue of whether Officer Mason had abridged the Purtells' right to freedom of speech under the First Amendment to the United States Constitution, and the issue of damages. At the close of the evidence, the Purtells moved for judgment as a matter of law under Fed. R. Civ. P. 50 as to the issue of liability, and the district court took the motion under advisement. The jury returned a verdict in favor of Officer Mason on the issue of liability, and, therefore, did not address the issue of damages. The Purtells filed a written post-trial motion renewing their motion under Fed. R. Civ. P. 50, and the district court denied the post-trial motion.

The Purtells appealed. The United States Court of Appeals for the Seventh Circuit held that the historical facts were undisputed (Petitioners' Appendix, 17a), and that Officer Mason had, in fact, abridged the Purtells' right to freedom of speech. (Petitioners' Appendix, 24a.) In this regard, the Court of Appeals held that the speech on the tombstones did not constitute "fighting words" because it did not have an inherent tendency to incite an immediate breach of the peace (Petitioners' Appendix, 24a), and because speech which inflicts injury does not constitute "fighting words" if it does not tend to provoke an average person to an immediate breach of the peace. (Petitioners' Appendix, 18a-22a.) The Court of Appeals, however, upheld the judgment anyway on the basis that qualified immunity insulated Officer Mason from liability because Officer Mason might reasonably have thought that speech which inflicts injury but does not incite an immediate breach of the peace was "fighting words," and because Officer Mason might have misunderstood the requirement that the speech be such as to provoke an average person to an immediate breach of the peace "in the context of this case" where there was violence in response to the speech, when Jeffrey Purtell was chest-butted by his neighbor. (Petitioners' Appendix 24a-25a.) The Court of Appeals rejected the Purtells' argument that no reasonable police officer could have believed that the speech on the tombstones constituted "fighting words" because the speech, which was on signs facing the public sidewalk in front of the Purtells' home, was not directed to "the person" of the individual whom the speech was about, but rather was on a display directed to the public at large. The rationale of the opinion of the Court of Appeals in this regard appears to be that speech directed to the public at large may constitute "fighting words" if the individual discussed in the speech is a member of the public, even where the speech is not directed to "the person" of that individual. (Petitioners' Appendix, 23a.)

REASONS FOR GRANTING THE PETITION

I.

This Petition For *Certiorari* Should Be Granted Because The Opinion Below Decided An Important Question Of Federal Law Involving The Scope Of The "Fighting Words" Doctrine In A Way That Conflicts With Prior Decisions Of This Court And A State Court Of Last Resort In That The Opinion Below Held That The Requirement Of The "Fighting Words" Doctrine That The Speech Be Directed To "The Person" Of The Hearer Is Satisfied Even If The Speech Is Directed To The Public At Large As Long As The Individual Whom The Speech Is About Is A Member Of The Public Even Where The Speech Is Not Directed To "The Person" Of That Individual, And In That The Opinion Below Held That A Reasonable Police Officer Could Have Believed That Speech Which Was On A Display Directed To The Public At Large But Which Was Not Directed To "The Person" Of The Individual Whom The Speech Was About Could Constitute "Fighting Words."

The doctrine of "fighting words" appears to derive from this Court's decisions in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), and *Chaplinski v. New Hampshire*, 315 U.S. 568 (1942). In each of those opinions, this Court's analyses indicated that, in order for speech to constitute "fighting words" unprotected by the United States Constitution, the speech had to be abusive remarks "directed to *the person* of the hearer" which were likely to provoke a breach of the peace. For example, in *Cantwell*, this Court wrote as follows:

> Cantwell's conduct, in the view of the court below, considered apart from the effect of his communication upon his hearers, did not amount to a breach of the peace. One may, however, be guilty of the offense if he commit acts or make statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, in practically all, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks *directed to the person of the hearer.* Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument. (Emphasis added)
>
> (310 U.S. 296, 309-310.)

And in *Chaplinski*, a "fighting words" case, this Court upheld the constitutionality of a state statute which had been construed to prohibit only "the face-to-face words plainly likely to cause a breach of the peace by the addressee . . ." (315 U.S. 568, 573.) This Court held the statute constitutional, citing its "limited scope" "as thus construed." 315 U.S. 568, 573.

In the context of the *Cantwell* and *Chaplinski* decisions, it is clear that the element of the "fighting words" doctrine that the speech be "directed to the person of the hearer" requires that the speech be addressed to "the person" of the individual who is the subject of the abusive remarks. It is not enough that

the speech be about the individual who hears it or reads it, the speech must be directed to "the person" of that individual. The speech must constitute "face-to-face" epithets, as opposed to speech about someone which is directed to the public at large, such as speech in a newspaper, magazine, or on a sign facing a public sidewalk. The extension of the "fighting words" doctrine to abusive remarks about an individual that are addressed to the public at large, and not to "the person" of the individual whom the speech is about, could put the editorial boards of major newspapers at risk of criminal prosecution.

The principle that to constitute "fighting words," the speech must be addressed to the hearer's "person" appears to have been recognized by this Court again in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). That case involved speech to the effect that the Reverend Falwell's "first time" was during a drunken incestuous rendezvous with his mother in an outhouse. (485 U.S. 46, 48.) The speech, however, was not directed by Larry Flynt to "the person" of the Reverend Falwell, but rather it was published in a magazine offered for sale to the public. This Court held that the speech did not constitute "fighting words." (485 U.S. 46, 56.) This Court's rationale for that holding is not explicitly stated in the opinion, but it is clear that the rationale was that the speech was not directed to "the person" of Reverend Falwell. Clearly, if Larry Flynt had approached the Reverend Falwell on the street and told him, "Your first time was during a drunken incestuous rendezvous with your mother in an outhouse," the speech would have qualified as "fighting words." This Court's opinion in *Hustler Magazine* makes it clear that it is not enough

that the speech be "about" someone in order to constitute "fighting words," but rather it must be directed to "his or her person" as opposed to the public at large.

In *Citizen Publishing Co. v. Miller*, 210 Ariz. 513, 115 P.3d 107, 113 (2005), in a case involving speech published in a newspaper in a letter to the editor, the Supreme Court of Arizona recognized that the doctrine of "fighting words" is limited to face-to-face interactions. The Court stated:

> The fighting words doctrine has generally been limited to 'face-to-face' interactions. *See, e.g., Chaplinsky [v. New Hampshire]*, 315 U.S. at 573, 62 S.Ct. 766 ('The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee.'); *Gooding v. Wilson*, 405 U.S. 518, 523-24, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972) (holding unconstitutional a Georgia statute that lacked the limitations of the statute in *Chaplinsky*).

The decision of the Court of Appeals in this case that the requirement of the "fighting words" doctrine that the speech be directed to "the person" of the hearer is met where the speech is directed to the public at large as long as the individual whom the speech is about is a member of the public, even where the speech is not directed to "the person" of that individual, is in conflict with the decisions stated above, as is the holding of the Court of Appeals in this case that, under those circumstances, qualified immunity should insulate the police officer from liability.

The doctrine of qualified immunity shields government officials from suit and liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. (*Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).) However, "a reasonably competent public official should know the law governing his conduct." (457 U.S. 800, 819.) In order to defeat qualified immunity, it is not necessary to show that the very conduct in question has previously been held unlawful. (*Anderson v. Creighton*, 483 U.S. 635, 640 (1987).) It is enough to show that the contours of the right are sufficiently clear that a reasonable official would understand that what he is doing violates that right. (483 U.S. 635, 640.) If, in light of pre-existing law, the unlawfulness of the conduct was apparent, the public official is not entitled to qualified immunity.

In light of the decisions of this Court on the matter of "fighting words" set forth above, the "contours" of the "fighting words" doctrine were sufficiently clear that a reasonable government official should have known that speech directed to the public at large does not constitute fighting words even if the individual whom the speech is about is a member of the public where the speech is not addressed to "the person" of that individual, and no reasonably competent police officer could have believed that the speech displayed on the tombstones in the Purtells' front yard constituted "fighting words." The Court of Appeals' opinion that qualified immunity insulated Officer Mason from liability for abridging the Purtells' First Amendment rights is at odds with those decisions of this Court.

CONCLUSION

For the reasons set forth herein, the Petitioners, Jeffrey R. Purtell and Vicki A. Purtell, respectfully request that this Honorable Court grant this Petition for a Writ of Certiorari, review and reverse the decision of the United States Court of Appeals for the Seventh Circuit, and remand this case for further proceedings so that the issue of damages may be adjudicated.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED MAY 14, 2008

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 06-3176

JEFFREY R. PURTELL and VICKI A. PURTELL,

Plaintiffs-Appellants,

v.

BRUCE MASON, in his individual capacity,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 04 C 7005—**Amy J. St. Eve**, *Judge.*

ARGUED APRIL 4, 2007—DECIDED MAY 14, 2008.

Before KANNE, WILLIAMS, and SYKES, *Circuit Judges.*

SYKES, *Circuit Judge.* This free-speech lawsuit requires us to determine the present scope of the "fighting-words" doctrine. The setting is a neighborhood feud. The case features an unsightly, 38-foot recreational vehicle stored on a residential driveway in suburban

Chicago, a neighborhood petition drive to force its removal, and a derogatory Halloween yard display erected in retaliation against the neighbors who led the petition drive. An unlucky police officer dispatched to mediate the dispute was sued for his efforts, accused of violating the First and Fourth Amendments.

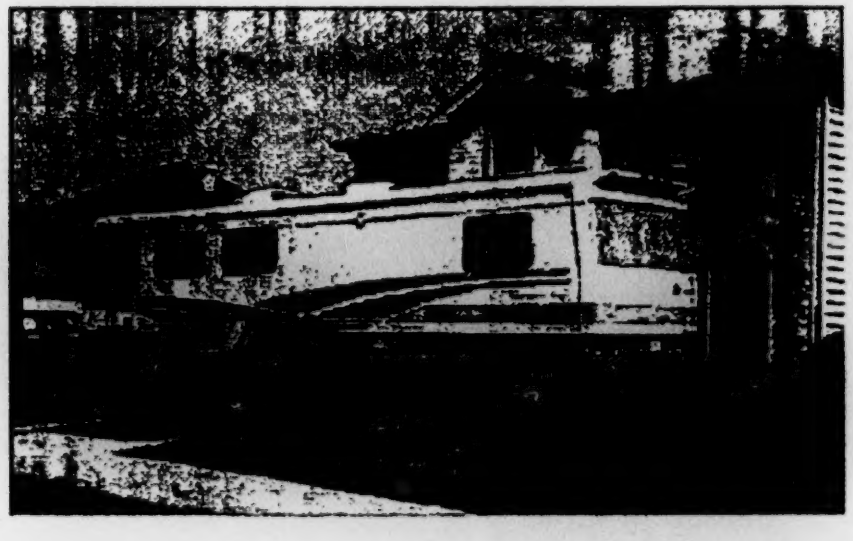
The plaintiffs claimed their Halloween display—wooden tombstones with epitaphs describing, in unflattering terms, the demise of their neighbors—was constitutionally protected speech. They alleged their rights under the First and Fourth Amendments were violated when the officer ordered them to remove the display on pain of arrest. The district court granted summary judgment for the officer on the Fourth Amendment claim but permitted the free-speech claim to proceed to trial. A sensible but probably misinstructed jury returned a verdict for the police officer.

We affirm. Summary judgment on the Fourth Amendment claim was properly granted. At the moment of arrest, the neighbor-combatants were engaged in a noisy argument over the tombstones, culminating in a "chest-butt." This provided probable cause to arrest for disorderly conduct. The First Amendment claim need not have been tried. The tombstone inscriptions, although insulting, cannot be considered fighting words as that doctrine is presently understood. The display was, accordingly, protected speech. But the officer's mistake about the scope of the plaintiffs' constitutional right to ridicule their neighbors was one a reasonable

officer might make in this situation. He was therefore entitled to qualified immunity.

I. Background

Jeffrey and Vicki Purtell owned a large recreational vehicle—38 feet long and 12 feet high—and for a while stored it at a rental-storage facility. In 2001, however, they fell on hard financial times and parked it on the driveway of their home in the Village of Bloomingdale, Illinois. There it sat for more than a year. Here is a picture:



The Purtells' neighbors were unhappy but tolerated the presence of this eyesore, at least initially. Their patience eventually wore thin, however, and they complained to the Village of Bloomingdale. There was little the Village could do because the Purtells were not violating any existing laws.

Appendix A

Several of the neighbors then took matters into their own hands and started a petition drive urging the Village to adopt an ordinance banning homeowners from storing RVs on their property. This effort was ultimately successful. In late November 2002, the Village Board enacted an ordinance prohibiting the storage of RVs on residential property.

The Purtells eventually complied with the ordinance and moved their RV, but not before making a crude retaliatory statement to their complaining neighbors. While the RV ordinance was still under consideration by the Village Board, the Purtells erected six wooden tombstones on their front lawn. It was mid-October and Halloween was coming, but the tombstones were not mere seasonal decorations; they carried a message for the neighbors who had pressed for the RV ordinance. Five of the six tombstones referred to a specific complaining neighbor followed by a short inscription describing the neighbor's death.

Appendix A

To be more specific, each tombstone was about three feet tall, and they were placed about five feet from the sidewalk, facing the street. Here is a picture of the display:

The tombstones were inscribed with epitaphs, in doggerel verse, directed at the neighbors who had petitioned for the RV ordinance. All but one referred to particular neighbors by name and specified a year of death corresponding to the neighbor's street address, plus one additional number. For example, a tombstone

referring to John Berka, who resides at 188 Jackson Lane, was inscribed as follows:

Old John Burkuh
Said he didn'T give a care
So They buried hiM
aLive uP To his hair.
He couLdn'T breath
So now we're relieved
Of ThaT NasTy oLd jerk!
~ 1888 ~

The remaining tombstones read as follows:

~ 1610 ~
Dyean was Known for Lying
So She was Fried.
Now underneath these daisies
is where she goes crazy!!

~ 1680 ~
Roses are red.
Violets are blue.
There's stiLL some space
Waiting for you!

Appendix A

BeTTe wAsN'T ReaDy,
BuT here she Lies
Ever since thAt night She DieD,
12 Feet deep in this trench . . .
Still wAsn'T Deep enough
For thAt wenches STench!
~ 1690 ~

Here Lies Jimmy,
The OlD Towne IDiot.
MeAn As sin even withouT his Gin.
No LonGer Does he wear
that sTupiD Old Grin . . .
Oh no, noT where
they've sent Him!
~ 1690 ~

OLd Man CrimP was a
GimP who couldn't hear.
SLiced his wife from ear To ear
She died . . . He was Fried.
Now They're TogeTher
again side by side!
~ 1720 ~

Appendix A

CrysTy wAs misTy-eyed
The DAy she DieD
AXE to the HeAD . . .
No DoubT She wAs DeAD.
Now There's no more comPlain'n
Even When iT's rain'n!
~ 1860 ~

These inscriptions referred to neighbors Diane Lesner, Betty Garbarz, James Garbarz, and a neighbor who owned a crimping shop. The "misty-eyed Crysty" referred to on the sixth tombstone was fictional; Jeff Purtell said he included this one to "balance out" the display.

The Purtells' neighbors were upset by the tombstone display, and several called the Bloomingdale Police Department to report that they felt intimidated by it and wanted it removed. On October 18 police officers were dispatched to the neighborhood and attempted to persuade Jeff Purtell to take down the tombstones; he refused, but agreed to cover the names with duct tape.

Halloween came and went, and still the tombstones remained. The simmering tension in the neighborhood eventually came to a boil on November 6, 2002, when the police were called because the duct tape had fallen

off the tombstones and the names were visible again. Officer Bruce Mason and another officer went to the neighborhood to try once more to mediate the dispute. They spoke with Betty Garbarz and Diane Lesner, who told the officers they felt threatened by the display, which they saw as a means for Purtell to vent his anger over the dispute about his RV. The officers then went to the Purtell residence and met with Jeff Purtell, explaining the depth of his neighbors' reaction to the tombstones. Purtell agreed to reapply the duct tape and came outside to do so. While he was reapplying the tape, Officer Mason asked him to take the tombstones down altogether. Officer Mason told Purtell the neighbors wanted him arrested because they felt threatened by the display. Purtell said that was not his intent.

While Officer Mason and Purtell were talking on the Purtells' front lawn, Bob Lesner, the Purtells' next-door neighbor and husband of Diane Lesner (the subject of one of the tombstones) arrived home. He came onto the Purtells' front lawn and began arguing with Jeff Purtell about the display. Tempers flared, a shouting match erupted, and Lesner chest-butted Purtell. After Officer Mason separated the men, he told Purtell if he did not agree to remove the tombstones, he would be arrested for disorderly conduct. Purtell again refused and was momentarily handcuffed. At that point, he rethought his options and relented, saying he would rather take the tombstones down than be arrested. Officer Mason removed the handcuffs, and Purtell dismantled the tombstone display.

The Purtells then sued Officer Mason for damages under 42 U.S.C. § 1983, asserting a First Amendment claim for violation of their free-speech rights and a Fourth Amendment claim for arresting Jeff Purtell without probable cause. Officer Mason moved for summary judgment on both counts, arguing that the arrest was supported by probable cause and he was entitled to qualified immunity because the speech on the tombstones was unprotected under the "fighting-words" doctrine. The district court granted the motion in part, holding there was probable cause to arrest Purtell for disorderly conduct, but concluded that material factual issues precluded a ruling on qualified immunity on the First Amendment claim.

The case was then tried to a jury. At the close of evidence, the Purtells orally moved for judgment as a matter of law; the judge took the motion under advisement. The court had decided to submit the question of whether the speech on the tombstones constituted fighting words to the jury, but the parties disagreed over the proper language for the fighting-words jury instruction. Their dispute centered on whether the definition of fighting words should include words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace"—the classic formulation from *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S.Ct. 766, 86 L.Ed. 1031 (1942)—or ought to be limited to words that are inherently likely to incite an immediate breach of the peace. The Purtells argued that including speech that merely "inflicts injury" in the definition of unprotected fighting words could not

be justified under more recent First Amendment case law. The district court disagreed and instructed the jury as follows:

> Let me explain what speech is protected by the First Amendment to the United States Constitution. Insofar as this case is concerned, any and all speech is protected by the First Amendment to the United States Constitution except what is referred to in law as "fighting words." In law, "fighting words" are abusive words or phrases (1) directed at the person of the addressee, (2) which by their very utterance inflict injury or tend to incite an immediate breach of the peace, that is, words that are likely to provoke a violent reaction, and (3) play no role in the expression of ideas.

The jury returned a verdict in favor of Officer Mason. The district court subsequently denied the Purtells' Rule 50 motion and entered judgment in favor of Officer Mason. The Purtells appealed.

II. Analysis

The Purtells contend the district court's jury instruction defining fighting words misstated the law. They also challenge the denial of their Rule 50 motion, arguing that the inscriptions on the tombstones were fully protected speech under the First Amendment, not fighting words as that doctrine has evolved. Both arguments depend on whether speech that merely

"inflicts injury"—as distinct from speech that "tends to incite an immediate breach of the peace"—may properly be regarded as fighting words under the Supreme Court's post-*Chaplinsky* case law. The Purtells also contend that summary judgment on the Fourth Amendment claim was improper. Officer Mason defends the summary judgment, the jury instruction, and the verdict. He argues in the alternative that he should not have been subjected to trial at all because he was entitled to qualified immunity; this determination also turns on the proper legal standard for fighting words.

There is considerable merit to the Purtells' argument about the current reach of the fighting-words doctrine (more on that later). However, we agree with Officer Mason that this case should not have been tried. Qualified immunity "shields government officials against suits arising out of their exercise of discretionary functions 'as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.' " *Jones v. Wilhelm,* 425 F.3d 455, 460 (7th Cir.2005) (quoting *Anderson v. Creighton,* 483 U.S. 635, 638, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)). The doctrine of qualified immunity is broad, protecting "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs,* 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). Qualified immunity leaves " 'ample room for mistaken judgments' by police officers." *Payne v. Pauley,* 337 F.3d 767, 776 (7th Cir.2003) (quoting *Malley,* 475 U.S. at 343, 106 S.Ct. 1092). This case involves just such a reasonable mistake.

Appendix A

A. Qualified Immunity Standard

Whether a government official is entitled to qualified immunity is a legal question for resolution by the court, not a jury. *Hunter v. Bryant*, 502 U.S. 224, 228, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991); *Hughes v. Meyer*, 880 F.2d 967, 969 (7th Cir.1989); *Jones v. City of Chicago*, 856 F.2d 985, 994 (7th Cir.1988). Qualified immunity "ordinarily should be decided by the court long before trial," *Hunter*, 502 U.S. at 228, 112 S.Ct. 534, "because '[t]he entitlement is an *immunity from suit* rather than a mere defense to liability,' " *id.* at 227, 112 S.Ct. 534 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)). The doctrine protects public officials "from undue interference with their duties and from potentially disabling threats of liability." *Harlow v. Fitzgerald*, 457 U.S. 800, 806, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); *see also Borello v. Allison*, 446 F.3d 742, 746 (7th Cir.2006) ("Qualified immunity protects a defendant from liability as well as from the burden of standing trial. For that reason, courts should determine as early on in the proceedings as possible whether a defendant is entitled to qualified immunity.").

Qualified-immunity claims are determined by reference to the two-part inquiry established in *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). First, the court "must consider . . . this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional

right?" *Id.; see also Wilhelm,* 425 F.3d at 460 (citing *Saucier,* 533 U.S. at 201, 121 S.Ct. 2151). If the answer to this question is "yes," then "the next, sequential step is to ask whether the right was clearly established" at the time of the alleged violation. *Saucier,* 533 U.S. at 201, 121 S.Ct. 2151.

This second inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.* "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202, 121 S.Ct. 2151. As long as "officers of reasonable competence could disagree on [the] issue, immunity should be recognized." *Malley,* 475 U.S. at 341, 106 S.Ct. 1092; *see also Wagner v. Washington County,* 493 F.3d 833, 837 (7th Cir.2007). Stated differently, the "clearly established" inquiry asks whether "in the light of pre-existing law the unlawfulness . . . [of the conduct was] apparent." *Anderson,* 483 U.S. at 640, 107 S.Ct. 3034. The plaintiff bears the burden of demonstrating the violation of a clearly established right. *Forman v. Richmond Police Dep't,* 104 F.3d 950, 957-58 (7th Cir.1997).

Saucier made it clear that the two steps in the qualified-immunity determination "must be considered in proper sequence." 533 U.S. at 200, 121 S.Ct. 2151. This "rigid order of battle" has been criticized on

practical, procedural, and substantive grounds.[1] *See Brosseau v. Haugen*, 543 U.S. 194, 201-02, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (Breyer, Scalia, and Ginsburg, JJ., concurring) ("a rigid 'order of battle' makes little administrative sense and can sometimes

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1. The "rigid" order of the *Saucier* test has been called into question because, among other things, it forces courts to resolve constitutional questions unnecessarily when there is no clearly established right. *Morse v. Frederick*, __ U.S. __, 127 S.Ct. 2618, 2641, 168 L.Ed.2d 290 (2007) (Breyer, J., concurring and dissenting) ("Sometimes the rule will require lower courts unnecessarily to answer difficult constitutional questions, thereby wasting judicial resources. Sometimes it will require them to resolve constitutional issues that are poorly presented. Sometimes the rule will immunize an incorrect constitutional holding from further review. And often the rule violates the longstanding principle that courts should 'not . . . pass on questions of constitutionality . . . unless such adjudication is unavoidable.' " (citation omitted)); *Bunting v. Mellen*, 541 U.S. 1019, 1024-25, 124 S.Ct. 1750, 158 L.Ed.2d 636 (2004) (Scalia, J., dissenting from denial of certiorari) (identifying *Saucier*'s procedural and substantive flaws and pointing out confusion among circuits about whether the order of the *Saucier* test is customary or mandatory); *Saucier v. Katz*, 533 U.S. 194, 210, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001) (Ginsburg, J., concurring); *Lyons v. City of Xenia*, 417 F.3d 565, 580-84 (6th Cir.2005) (Sutton, J., concurring) (describing the practical and legal anomalies of *Saucier*'s sequential-question mandate); *Dirrane v. Brookline Police Dep't*, 315 F.3d 65, 69-70 (1st Cir.2002) (stating the rigid order of the *Saucier* test "makes sense where the issue is whether some abstract right exists[,] . . . [b]ut it is an uncomfortable exercise where . . . the answer whether there was a violation may depend on a kaleidoscope of facts not yet fully developed").

lead to a constitutional decision that is effectively insulated from review"). The Supreme Court recently granted certiorari to consider whether *Saucier* should be overruled. *Pearson v. Callahan*, 76 U.S.L.W. 3510 (2008) (directing the parties to "brief and argue the following question: 'Whether the Court's decision in *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001) should be overruled?' "). In the meantime, of course, we continue to apply the sequential approach it prescribed.[2]

B. First Amendment Claim

The district judge declined to decide whether Officer Mason was entitled to qualified immunity on the First

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2. Officer Mason could have immediately appealed the denial of his qualified-immunity claim. *Behrens v. Pelletier*, 516 U.S. 299, 313, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996); *Mitchell v. Forsyth*, 472 U.S. 511, 524-25, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985); *Coady v. Steil*, 187 F.3d 727, 730 (7th Cir.1999). That he did not do so does not preclude us from resolving this appeal based on qualified immunity. *Pearson v. Ramos*, 237 F.3d 881, 883 (7th Cir.2001) ("Even when there is a right of interlocutory appeal, a party can wait till the case is over and then appeal, bringing before us all nonmoot interlocutory rulings adverse to him. This principle is as applicable to rulings on immunity as to any other interlocutory rulings.") (citations omitted); *Kurowski v. Krajewski*, 848 F.2d 767, 773 (7th Cir.1988) (holding that "a public official may raise questions of immunity on appeal from a final judgment, even though he bypassed an opportunity to take an interlocutory appeal"). This principle permits Officer Mason to raise qualified immunity as an alternative ground upon which to affirm the judgment in his favor.

Amendment claim because she thought "there [was] a genuine issue of material fact as to whether [the officer] acted in an objectively reasonable manner when he asked Jeffrey Purtell to take down the tombstones." This was error. The historical facts were undisputed. Whether Officer Mason's actions were reasonable is the second half of the qualified-immunity inquiry. Whether the facts established a constitutional violation (the first half of the immunity inquiry) requires a determination and application of the proper legal standard for fighting words. These were questions for the court, not the jury.

In *Chaplinsky,* the Supreme Court identified "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem." 315 U.S. at 571-72, 62 S.Ct. 766. "These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* at 572, 62 S.Ct. 766. The Court observed that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[3] *Id.*

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3. Although some of the Purtells' neighbors said they felt threatened by the tombstone display, Officer Mason prudently did not invoke the "true-threats" doctrine. A "true threat" has been defined as follows:

(Cont'd)

Although *Chaplinsky* purported to define fighting words in the alternative—words that "by their very utterance inflict injury *or* tend to incite an immediate breach of the peace," *id.* (emphasis added)—the statute under challenge in the case had been definitively construed by the state courts to apply *only* to speech falling in the latter category. Noting that "[t]he statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee," the Court upheld it against a facial challenge. *Id.* at 573, 62 S.Ct. 766 ("We are unable to say that the limited scope of the statute as thus construed contravenes the constitutional right of free expression."). The Court then rejected the as-applied

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(Cont'd)

> "True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.... The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur."

Virginia v. Black, 538 U.S. 343, 359-60, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003) (citations omitted) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992)). Nor did Officer Mason attempt to defend his order to dismantle the tombstones as a reasonable "time, place, or manner" restriction. *See R.A.V.*, 505 U.S. at 386, 112 S.Ct. 2538.

challenge as well. The defendant in the case had been convicted for calling a law enforcement officer a "damn racketeer" and a "damn Fascist." *Id.* at 569, 62 S.Ct. 766. The Court held that "[a]rgument is unnecessary to demonstrate that the appellations 'damn racketeer' and 'damn Fascist' are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Id.* at 574, 62 S.Ct. 766. Accordingly, the Court in *Chaplinsky* had no occasion to elaborate on the "inflict-injury" aspect of the fighting-words definition it had articulated.

In later cases, the Court has either dropped the "inflict-injury" alternative altogether or simply recited the full *Chaplinsky* definition without further reference to any distinction between merely hurtful speech and speech that tends to provoke an immediate breach of the peace. *See Virginia v. Black*, 538 U.S. 343, 359, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003) (a cross-burning case decided on threat-doctrine grounds in which the Court quoted the full *Chaplinsky* test but noted *Cohen v. California*'s narrowing of the fighting-words doctrine); *Texas v. Johnson*, 491 U.S. 397, 409, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (in throwing out a flag-burning conviction, the Court dropped the inflict-injury prong of the *Chaplinsky* definition and confined fighting words to those that are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace") (internal quotes omitted); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982) (describing fighting words as "those that provoke immediate violence"); *Lewis v. City of New*

Orleans, 415 U.S. 130, 132, 94 S.Ct. 970, 39 L.Ed.2d 214 (1974) (quoting full *Chaplinsky* definition but omitting any reference to the inflict-injury prong); *Gooding v. Wilson*, 405 U.S. 518, 524-27, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972) (same); *Cohen v. California*, 403 U.S. 15, 20, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971) (modifying definition of fighting words to encompass "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction"); *Terminiello v. City of Chicago*, 337 U.S. 1, 4, 69 S.Ct. 894, 93 L.Ed. 1131 (1949) (stating speech is protected "unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest . . . [;][t]here is no room under our Constitution for a more restrictive view"); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 414, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992) (White, J., concurring) ("The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected.").

Although the "inflict-injury" alternative in *Chaplinsky*'s definition of fighting words has never been expressly overruled, the Supreme Court has never held that the government may, consistent with the First Amendment, regulate or punish speech that causes emotional injury but does *not* have a tendency to provoke an immediate breach of the peace. *See* Note, *The Demise of the* Chaplinsky *Fighting Words Doctrine: An Argument for its Interment*, 106 HARV. L. REV. 1129, 1129 (1993) ("The jurisprudential history of the

Chaplinsky doctrine has led some commentators to conclude that the Court has sub rosa overruled the entire fighting words doctrine, or at least the 'inflict injury' prong."); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-18, at 929 n. 9 (2d ed. 1988) ("The Court has in effect incorporated the clear and present danger test into the fighting words doctrine."); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 508-09 (explaining that "the first prong of *Chaplinsky*'s fighting words definition, words 'which by their very utterance inflict injury,' was dictum"; the Court has subsequently "substantially narrowed *Chaplinsky*'s definition of fighting words by bringing that definition into line with *Chaplinsky*'s actual holding"). The justification for "plac[ing] fighting words outside the protection of the First Amendment" is not their capacity to inflict emotional injury—many words do that—but their tendency "to provoke a violent reaction and hence a breach of the peace." *Nuxoll* ex rel. *Nuxoll v. Indian Prairie Sch. Dist. # 204*, 523 F.3d 668, 670 (7th Cir.2008).

We have previously held that speech inflicting psychic trauma alone—without any tendency to provoke responsive violence or an immediate breach of the peace—does not lose constitutional protection under the fighting-words doctrine. *Collin v. Smith*, 578 F.2d 1197, 1203 (7th Cir.1978) ("A conviction for less than words that at least tend to incite an immediate breach of the peace cannot be justified under *Chaplinsky.*") *Collin* involved a proposed Nazi march through the Village of Skokie, Illinois. The parade would feature members of

the National Socialist Party of America wearing the uniforms of the German Nazi Party and carrying Nazi flags bearing swastikas. Skokie had a large Jewish population and was home to many Holocaust survivors and their families; the potential for severe psychological injury as a result of the proposed Nazi parade was conceded. It was also conceded, however, that the march was not likely to provoke responsive violence or immediate breaches of the peace. Absent that tendency, we held the speech in question did not qualify as fighting words and remained constitutionally protected. *Id.*

We see nothing in the Supreme Court's more recent iterations of the fighting-words doctrine that would presage a revitalization of the "inflict-injury" alternative in the *Chaplinsky* definition. To the contrary, whatever vitality it may have had when *Chaplinsky* was announced, the "inflict-injury" subset of the fighting-words definition has never stood on its own. It seems unlikely that speech causing emotional injury but *not* tending to provoke an average person to an immediate breach of the peace would qualify as fighting words, unprotected by the First Amendment and therefore capable of being regulated or punished without raising any constitutional concern.

With this understanding of the contours of the fighting-words doctrine, we proceed to step one of the *Saucier* inquiry: whether Officer Mason violated the Purtells' free-speech rights by ordering Jeff Purtell to remove the tombstones or face arrest. The jury found for the officer, having been instructed that all speech is

protected except fighting words, which it was told included words that "inflict injury" *or* "tend to incite an immediate breach of the peace." As we have noted, it was error to submit this claim to the jury in the first place, but *not* because the facts do not make out a constitutional violation—they do, notwithstanding the jury's verdict to the contrary.

While the tombstones apparently elicited an emotional response from the Purtells' neighbors—embarrassment, anger, resentment, and for some, fear—the messages were not, in context, the sort of provocatively abusive speech that inherently tends to incite an immediate breach of the peace. These were Halloween decorations, after all. It is true their mocking messages were directed at particular neighbors as well as the passing public. *See Hess v. Indiana*, 414 U.S. 105, 107-08, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973) (speech must be personally insulting and directed at particular person or group to be considered fighting words). But the average person, understanding the full context, would recognize the tombstone inscriptions as nothing more than an adolescent attempt at retaliatory ridicule—*not* the sort of inflammatory and personally abusive epithets that tend to provoke a violent reaction.

As importantly, the tombstones were on display for weeks without raising any potential for violence or disruption. Although an actual disturbance is not required for the doctrine to apply, *see Gower v. Vercler*, 377 F.3d 661, 670 (7th Cir.2004), to qualify as fighting words, the speech in question must have a tendency to

provoke an average person to commit an *immediate* breach of the peace. The tombstones did not have that tendency, and in fact for a long time stood on the Purtells' lawn without incident, sometimes with the neighbors' names obscured by duct tape, sometimes not. The neighbors complained to the police, but the scene remained quiet until the November episode of shouting and chest-butting between Purtell and Bob Lesner. Such a belated breach of the peace cannot be attributed to the words themselves or used to demonstrate that the speech at issue was inherently provocative of a violent or "fighting" reaction.

Because the tombstones did not have an inherent tendency to incite an immediate breach of the peace, they did not fall within that "narrowly limited" class of unprotected speech defined by the fighting-words doctrine. Frankly, we doubt whether the words on the tombstones were strong enough to qualify as words that "by their very utterance inflict injury"—if that, standing alone, were enough to constitute fighting words. Considered in their context, the tombstones did not inflict the sort of severe, personal, and inherently injurious insult that the fighting-words doctrine contemplates, however wounded the Purtells' neighbors might actually have felt.

But Officer Mason's mistake in thinking he could constitutionally order Purtell to dismantle the tombstone display on pain of arrest was one a reasonable officer might make in this situation. Although the fighting-words doctrine has been with us for decades, it

has not been entirely clear (as we have explained) whether speech that injures but does not incite an immediate breach of the peace is protected or unprotected. And Officer Mason reasonably may have misunderstood the immediacy requirement of the fighting-words doctrine in the context of this case. He did have a fight on his hands, and he reasonably believed he had the authority to force the removal of the irritant in order to keep the peace. In misapprehending the constitutionally protected status of the Purtells' tombstone speech, Officer Mason did not violate clearly established rights.[4] First Amendment line-drawing is often difficult, even in hindsight. Officer Mason's on-the-street judgment, though mistaken, is entitled to qualified immunity.

C. Fourth Amendment Claim

The district court granted Officer Mason's motion for summary judgment on the Fourth Amendment claim, holding there was probable cause to arrest. *See Morfin v. City of East Chicago*, 349 F.3d 989, 997 (7th Cir.2003) (stating that existence of probable cause bars § 1983 claim). This decision was manifestly correct. "Police

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4. This conclusion is supported by the Purtells' inability to point to a closely analogous case that would be instructive to an officer faced with this situation. *See Forman v. Richmond Police Dep't*, 104 F.3d 950, 957-58 (7th Cir.1997) (quoting *Powers v. Lightner*, 820 F.2d 818, 821 (7th Cir.1987)) (stating plaintiff can meet burden of showing clearly established right by pointing to "closely analogous cases" decided before the defendants acted or failed to act).

ordinarily have probable cause if, at the time of the arrest, the 'facts and circumstances within the officer's knowledge . . . are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense.' " *Wagner*, 493 F.3d at 836 (quoting *Michigan v. DeFillippo*, 443 U.S. 31, 37, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979)). The facts and circumstances are considered as they appeared to Officer Mason at the time of arrest. *Id.*

Officer Mason arrested Purtell after witnessing his participation in a loud argument with his neighbor that had escalated to a chest-butt before the officer was able to intervene to prevent further physical altercation. This qualifies as disorderly conduct under Illinois law: "A person commits disorderly conduct when he knowingly . . . [d]oes any act in such unreasonable manner as to alarm or disturb another and to provoke a breach of the peace." 720 ILL. COMP. STAT. 5/26-1(a)(1) (2006). That Bob Lesner was not also arrested is irrelevant. That the focus of the argument was the tombstones—protected speech—is likewise irrelevant. We have already held that Officer Mason is entitled to qualified immunity to the extent the arrest was related to Jeff Purtell's exercise of his First Amendment rights. The mounting public argument between Lesner and Purtell supplied probable cause to arrest for disorderly conduct apart from Purtell's exercise of free speech. Accordingly, there was no Fourth Amendment violation, and summary judgment on this claim was appropriate.

III. Conclusion

In closing, a few words in defense of a saner use of judicial resources. It is unfortunate that this petty neighborhood dispute found its way into federal court, invoking the machinery of a justice system that is admired around the world. The suit was not so wholly without basis in fact or law as to be frivolous, but neither was it worth the inordinate effort it has taken to adjudicate it—on the part of judges, jurors, court staff, and attorneys (all, of course, at public expense). We take this opportunity to remind the bar that sound and responsible legal representation includes counseling as well as advocacy. The wiser course would have been to counsel the plaintiffs against filing such a trivial lawsuit. Freedom of speech encompasses " 'the freedom to speak foolishly and without moderation,' " *Cohen,* 403 U.S. at 26, 91 S.Ct. 1780 (quoting *Baumgartner v. United States,* 322 U.S. 665, 674, 64 S.Ct. 1240, 88 L.Ed. 1525 (1944)), but it does not follow that every nominal violation of that right is—or should be—compensable. *See Brandt v. Bd. of Educ. of City of Chi.,* 480 F.3d 460, 465 (7th Cir.2007) ("*[D]e minimis non curat lex* (the law doesn't concern itself with trifles) is a doctrine applicable to constitutional as to other cases," and an award of nominal damages "presupposes a violation of sufficient gravity to merit a judgment, even if significant damages cannot be proved."). Not every constitutional grievance deserves an airing in court. Lawsuits like this one cast the legal profession in a bad light and contribute to the impression that Americans are an overlawyered and excessively litigious people.

AFFIRMED.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED AND FILED JULY 18, 2006

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Case No. 04 C 7005

JEFFREY R. PURTELL and VICKI A. PURTELL,

Plaintiffs,

v.

BRUCE MASON, in his individual capacity,

Defendant.

MEMORANDUM OPINION AND ORDER

AMY J. ST. EVE, District Court Judge.

Plaintiffs Jeffrey R. Purtell and Vicki A. Purtell bring a post-trial motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b), or in the alternative, a motion for a new trial pursuant to Rule 59(a). For the following reasons, the Court denies Plaintiffs' motions.

Appendix B

BACKGROUND

The Purtells filed the present lawsuit against Defendant Village of Bloomingdale Police Officer Bruce Mason alleging that he violated their First and Fourth Amendment rights to the United States Constitution. *See* 42 U.S.C. § 1983. The Court granted Officer Mason's Motion for Summary Judgment regarding the Purtells' Fourth Amendment claim. The Court, however, denied Officer Mason's summary judgment motion regarding the Purtells' First Amendment claim. At trial, the Purtells argued that Officer Mason violated their First Amendment rights when he requested that they remove certain Halloween tombstone "decorations" from their property. The Court conducted a jury trial on April 17 and 18, 2006, after which the jury returned a verdict in favor of Officer Mason. The Purtells then filed the present post-trial motions.

ANALYSIS

I. Judgment as a Matter of Law Pursuant to Rule 50(b)

The Purtells first argue that based on the evidence presented at trial, no reasonable jury could have determined liability in favor of Officer Mason. When ruling on a motion for judgment as a matter of law following a jury verdict, the Court does not re-weigh the evidence presented at trial or make credibility determinations. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). Instead, considering the totality of the evidence, the Court determines whether the jury was presented with a "legally

sufficient amount of evidence from which it could reasonably derive its verdict." *Massey v. Blue Cross-Blue Shield of Illinois*, 226 F.3d 922, 924 (7th Cir.2000). In other words, the Court must determine whether any rational jury could have found for Officer Mason. *See Harvey v. Office of Banks & Real Estate*, 377 F.3d 698, 707 (7th Cir.2004). In determining a motion under Rule 50(b), the Court views the evidence and all reasonable inferences in a light most favorable to the party who prevailed under the verdict—in this case Officer Mason. *Reeves*, 530 U.S. at 150-51; *Learning Curve Toys, Inc. v. Play Wood Toys, Inc.*, 342 F.3d 714, 721 (7th Cir.2003).[1]

A. Fighting Words

The Purtells argue that the language on the Halloween tombstones contained speech that was protected by the First Amendment, specifically, that such speech was not "fighting words." Although the First Amendment protects freedom of speech and expressive conduct, *see RAV v. City of St. Paul, Minnesota*, 505 U.S. 377, 382, 112 S.Ct. 2538, 2542, 120 L.Ed.2d 305 (1992), First Amendment protections are not absolute. *Virginia v. Black*, 538 U.S.

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1. The Purtells' reliance on *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557, 581, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995) for the Court's standard of review is misplaced. The procedural history in *Irish-American* involved the defendants' appeal from a Massachusetts trial court's preliminary injunction order. *See Irish-American Gay, Lesbian & Bisexual Group of Boston v. Boston*, 418 Mass. 238, 636 N.E.2d 1293 (1994). Accordingly, the United States Supreme Court's review did not involve any post-trial motions involving a jury's factual findings and verdict.

343, 358, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003). The Supreme Court has held that fighting words—"those which by their very utterance inflict injury or tend to incite an immediate breach of the peace"—are not protected under the First Amendment. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S.Ct. 766, 86 L.Ed. 1031 (1942).

Viewing the evidence and all reasonable inferences in a light most favorable to Officer Mason, the parties presented the jury with a "legally sufficient amount of evidence from which it could reasonably derive its verdict." *See Massey*, 226 F.3d at 924. In short, a rational jury could return a verdict in Officer Mason's favor by concluding that the words on the tombstones constituted fighting words, and thus were not protected by the First Amendment.

Evidence presented at trial revealed that the Purtells placed the tombstones referring to their neighbors in their front yard facing the street. The tombstones specifically referred to their neighbors, who saw the language on the tombstones. For instance, the tombstone that referred to the Purtells' neighbor James Garbarz stated:

> Here Lies Jimmy,
> The OlDe Towne IdioT
> MeAn As sin even withouT his Gin
> No LonGer Does He wear
> That sTupiD Old Grin . . .
> Oh no, noT where
> they've sent Him!
> – 1690 –

Appendix B

The tombstone referring to the Purtells' neighbor Betty Garbarz read:

BeTTe wAsN'T ReADy,
BuT here she Lies
Ever since that night she DieD.
12 feet Deep in this trench . . .
Still wasn'T Deep enough
For that wenches Stench!
– 1690 –

In addition, the Purtells placed a Halloween tombstone in their yard concerning their neighbor Diane Lesner stating:

– 1610 –
Dyean was Known for Lying
So She was fried.
Now underneath these daises
is where she goes crazy!!

Moreover, the jury heard testimony that Diane Lesner, James Garbarz, and Betty Garbarz were upset because their names appeared on the tombstones. Betty Garbarz testified that she was so upset by the language on the tombstones that she contacted the Village of Bloomingdale Police Department. She further testified that she never had any doubt that the "Bette" tombstone referred to her. After seeing the tombstones, she stated that she was ashamed and humiliated, but did not talk to Jeffrey Purtell about them because she was afraid of him.

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Defense counsel also presented evidence that the neighbors thought the language on the tombstones constituted threats and that they were alarmed and disturbed by their names being on the tombstones. James Garbarz testified that he interpreted the "Jimmy" tombstone as a threat and told the police that he felt threatened by the tombstone. He also testified that he had concerns about his safety and what Jeffrey Purtell might do to him.

Officer Mason testified that the neighbors told him that they had an ongoing problem with the Purtells because of the tombstones and that the neighbors took the tombstones as a threat. He also testified that the neighbors were afraid of Jeffrey Purtell. Further, Officer Mason testified that he was aware that the neighbors had a prior altercation before the November 6, 2002 incident. In addition, he testified that Jeffrey Purtell told him he put up the signs to get back at his neighbors, and thus Officer Mason thought Jeffrey Purtell was seeking revenge.

Viewing the evidence and all reasonable inferences in a light most favorable to Officer Mason, a rational jury could conclude that the language on the tombstones constituted threats, that the neighbors were afraid of Jeffrey Purtell, and that they feared for their safety. As such, the Court will not disturb the jury's conclusion that the tombstones constituted fighting words—"those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *See Chaplinsky*, 315 U.S. at 572.

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B. Language on the Tombstones

The Purtells also argue that the language on the tombstones was directed to the public—not the individual neighbors—and thus the statements did not amount to fighting words. In support of their argument, the Purtells rely on an Arizona case, *Citizen Publishing Co. v. Miller*, 210 Ariz. 513, 516, 115 P.3d 107, 110 (Ariz.2005). Arizona state court cases are not controlling authority on this Court. Nonetheless, evidence in the record indicates that although the Purtells placed the tombstones referring to their neighbors in their front yard, the tombstones faced the street and specifically referred to their neighbors by name. *See Cohen v. California*, 403 U.S. 15, 20, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971) (language must be "directed to the person of the hearer.") (citation omitted). Accordingly, based on the evidence presented at trial, a rational jury could conclude that the tombstones were directed at the neighbors in question.

II. Motion for a New Trial Pursuant to Rule 59(a)

The Purtells also move this Court for a new trial pursuant to Rule 59(a). In ruling on a motion for new trial under Rule 59(a), the Court must determine whether the jury verdict was against the weight of the evidence or if the trial was unfair to the moving party. *Kapelanski v. Johnson*, 390 F.3d 525, 530 (7th Cir.2004). Federal courts will not "set aside a jury verdict if a reasonable basis exists in the record to support the verdict, viewing the evidence in the light most favorable

to the prevailing party, and leaving issues of credibility and weight of evidence to the jury." *Id.* The Seventh Circuit reviews new trial motions for an abuse of discretion, which occurs only when no reasonable person could agree with the district court. *ABM Marking, Inc. v. Zanasi Fratelli S.R.L.*, 353 F.3d 541, 543 (7th Cir.2003).

A. Motion for a New Trial

The Purtells contend that the jury's verdict was against the weight of the evidence, *see Kapelanski*, 390 F.3d at 530, and incorporate the same arguments they made in their Rule 50(b) motion. For the reasons discussed in detail above, the Court denies the Purtells' motion under Rule 59(a). The Court will not set aside the jury's verdict because, viewing the evidence in a light most favorable to Officer Mason, a reasonable evidentiary basis exists to support the jury's verdict. *Kapelanski*, 390 F.3d at 530

B. Jury Instructions

Next, the Purtells argue that because the Court erred in ruling on two of their proposed jury instructions, they are entitled to a new trial. The Court is not required to give an "idealized set of perfect jury instructions," instead, the instructions must be legally correct and supported by the evidence. *Byrd v. Illinois Dep't. of Pub. Health*, 423 F.3d 696, 705 (7th Cir.2005). To prevail on a Rule 59(a) motion based on erroneous jury instructions, the Purtells must establish that

(1) the instructions did not adequately state the law, and (2) the error was prejudicial because the instructions confused or misled the jury. *Id.; Boyd v. Illinois State Police*, 384 F.3d 888, 894 (7th Cir.2004). Erroneous jury instructions are not prejudicial unless "considering the instructions as a whole, along with all of the evidence and arguments, the jury was misinformed about the applicable law." *Boyd*, 384 F.3d at 894.

The Purtells argue that the Court erred when it did not give Plaintiffs' Proposed Jury Instructions No. 3 and No. 25 in which they defined "fighting words." The relevant language in the Purtells' instructions reads:

> In law, "fighting words" are abusive words or phrases (1) directed at the person of the addressee, and (2) **inherently likely under the circumstances to cause an average person to react with violence,** and (3) playing no role in the expression of ideas.

(Emphasis added).

The Purtells based their instructions on *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S.Ct. 766, 86 L.Ed. 1031 (1942); *Cannon v. City and County of Denver*, 998 F.2d 867, 873 (10th Cir.1993); *UWM Post, Inc. v. Board of Regents*, 774 F.Supp. 1163, 1169-1171 (E.D.Wis. 1991). Because the Tenth Circuit's and Eastern District of Wisconsin's decisions are not controlling on this Court, the Court turned to binding Supreme Court and

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Seventh Circuit case law for guidance on the disputed jury instructions. Specifically, *Chaplinsky* states:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—**those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.**

Chaplinsky, 315 U.S. at 571-72 (emphasis added). Based on *Chaplinsky*, other Supreme Court cases, and Seventh Circuit case law, as discussed below, the Court gave the following jury instruction:

> In law, "fighting words" are abusive words or phrases (1) directed at the person of the addressee, (2) **which by their very utterance inflict injury or tend to incite an immediate breach of the peace,** that is, words that are likely to provoke a violent reaction, and (3) play no role in the expression of ideas.

(emphasis added).

The Purtells argue that the inclusion of the language "by their very utterance inflict injury or" from the *Chaplinsky* opinion allowed the jury to find that the statements on the tombstones were "fighting words"

even if they were not likely to provoke a violent reaction. Citing an Eastern District of Wisconsin case, the Purtells argue that the Supreme Court has narrowed the *Chaplinsky* definition of fighting words. *See UWM Post, Inc.*,, 774 F.Supp. at 1170.

The Supreme Court, however, has recently cited the disputed *Chaplinsky* language with approval. *See Virginia v. Black*, 538 U.S. 343, 359, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003) ("a State may punish those words '**which by their very utterance inflict injury** or tend to incite an immediate breach of the peace.' "). Furthermore, in the context of a disorderly conduct violation, the Seventh Circuit has also cited the disputed *Chaplinksky* language with approval. *See Gower v. Vercler*, 377 F.3d 661, 670 (7th Cir.2004). Specifically, when determining whether plaintiff Keith Gower's repeated offensive oral remarks combined with his other attempts to humiliate his father-in-law constituted fighting words, the Seventh Circuit explained:

> We reject Gower's assertion because we have little difficulty concluding, as a matter of law, that Deputies Vercler and Garrett had probable cause to believe that Gower's reported verbal assaults, directed at the Taylors, consisted of "fighting words" that "**by their very utterance inflict injury** or tend to incite an immediate breach of the peace," and "the prevention and punishment of which has never been thought to raise any Constitutional problem."

Id. (citation omitted) (emphasis added).

It is true that many courts focus on the second part of the *Chaplinsky* definition—"tend to incite an immediate breach of the peace"—instead of the first part. *See, e.g., Cohen*, 403 U .S. at 20 ("personally abusive epithets . . .. inherently likely to provoke a violent reaction"). The disputed *Chaplinsky* language, however, is still good law. *See Virginia v. Black*, 538 U.S. at 359; *Gower*, 377 F.3d at 670. Because the Purtells cannot establish that the Court's instructions failed to adequately state the relevant law, their argument based on the jury instructions fail.

C. Evidentiary Ruling

Finally, the Purtells challenge the Court's evidentiary ruling pertaining to the exclusion of evidence that their son, David, was afflicted with Guillain-Barre Syndrome at the time of the events in this matter. A party seeking a new trial based on a district court's alleged erroneous evidentiary rulings bears a "heavy burden ." *Alverio v. Sam's Warehouse Club*, 253 F.3d 933, 942 (7th Cir.2001). The Seventh Circuit reviews "the exclusion of evidence for abuse of discretion and gives considerable deference to the trial judge," and thus, "even if a judge's rulings are found to be erroneous, they may be deemed harmless if the record indicates that the end result of the trial would have remained unchanged." *Id.* (internal citation omitted). In other words, a "new trial is warranted only if the error has a substantial and injurious effect or influence on the determination of a jury, and the result is inconsistent with substantial justice." *Cerabio LLC v. Wright Med.*

Tech., Inc., 410 F.3d 981, 994 (7th Cir.2005) (internal citation omitted).

Prior to trial, the Court granted Officer Mason's motion in limine to exclude any evidence concerning David Purtell's illness. Officer Mason argued that any such testimony was inadmissible because it lacked proper foundation, was irrelevant, and was also prejudicial. In granting Officer Mason's motion, the Court concluded:

> [A]ny evidence concerning David Purtell's illness does not relate to any fact that is of consequence in this action. *See* Fed.R.Evid. 401. In other words, whether David Purtell was in the hospital or had Gullian-Barre Syndrome does not relate to the tombstones, the neighbors' complaints about the tombstones, Officer Mason's involvement in this matter, or whether the tombstones constituted "fighting words." Furthermore, even if David's illness were relevant, Plaintiffs' attempt to use such evidence to evoke sympathy would be unfairly prejudicial. *See* Fed.R.Evid. 403.

(R. 52-1, Court Order of April 10, 2006).

The Purtells contend that their son's illness goes to the severity of Vicki Purtell's mental and emotional suffering. Even if the Purtells' contention were true, the Court unequivocally ruled that any such evidence would be unfairly prejudicial to Officer Mason. The Purtells did not address Rule 403's limitations in their motion in limine, nor do they address the Court's ruling concerning prejudice in their post-trial motion. Without more, they have failed to establish that any such "error has a substantial and injurious effect or influence on the determination of a jury, and the result is inconsistent with substantial justice." *Cerabio*, 410 F.3d at 994. The Purtells' argument based on the Court's exclusion of the evidence regarding their son's illness thus fails.

CONCLUSION

For these reasons, the Court denies Plaintiffs' post-trial motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b) and motion for a new trial pursuant to Rule 59(a).

Date: July 18, 2006

ENTERED

s/ Amy J. St. Eve
AMY J. ST. EVE
United States District Court Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS DENYING MOTION FOR RECONSIDERATION DATED AND FILED FEBRUARY 22, 2006

United States District Court,
Northern District of Illinois

Name of Assigned Judge or Magistrate Judge
Amy J. St. Eve

CASE NUMBER
04 C 7005

DATE
2/22/2006

CASE TITLE
Purtell vs. Mason

DOCKET ENTRY TEXT

Plaintiffs' Motion for Reconsideration challenging the Court's January 17, 2006, Memorandum, Opinion, and Order granting in part and denying in part Defendant's Motion for Summary Judgment [37] is denied.

STATEMENT

Before the Court is Plaintiffs' Motion for Reconsideration challenging the Court's January 17, 2006, Memorandum, Opinion, and Order granting in part and denying in part Defendant's Motion for Summary

Judgment. Specifically, Plaintiffs contend that the Court erred in concluding that Defendant Officer Mason had probable cause to arrest Plaintiff under Count II of the Complaint. Based on the following discussion, the Court denies Plaintiffs' Motion for Reconsideration.

A court may exercise its inherent authority to reconsider an interlocutory order because such orders are "subject to revision at any time before the entry of judgment adjudicating all the claims." *See* Fed.R.Civ.P. 54(b); *see also Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 12, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) ("every order short of a final decree is subject to reopening at the discretion of the district judge"). Accordingly, under Rule 54(b), the Court may correct clear errors of fact or law in an interlocutory order. *See Young v. Murphy*, 161 F.R.D. 61, 62 (N.D. Ill. 1995).

Plaintiffs contend that the Court erred in its probable cause determination because Defendant only argued that he had probable cause to arrest Plaintiff Jeffrey Purtell based on the tombstones' language constituting "fighting words." Plaintiffs' contention is not accurate, however, because at summary judgment Defendant argued that the neighbors were upset and alarmed by the tombstones and that the Plaintiff and a neighbor engaged in an altercation concerning the tombstones. Accordingly, Defendant argued that Plaintiff committed the offense of disorderly conduct in violation of 720 ILCS 5/26(a)(1) and Defendant had probable cause to believe that Purtell had committed such offense.

Nevertheless, even if Officer Mason based his probable cause determination solely on the "fighting words," Officer Mason is still shielded by qualified immunity. It is well-established that police officers who "reasonably but mistakenly conclude that probable cause is present" are also entitled to qualified immunity.

Anderson v. Creighton, 483 U.S. 635, 641, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). The relevant question is thus whether "a reasonable officer could have believed that probable cause existed." *Hunter v. Bryant*, 502 U.S. 224, 229, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991).

Although it is a question of fact for the jury whether the language on the tombstones constituted "fighting words" under Plaintiffs' First Amendment claim, the record reflects that it was reasonable for Officer Mason to conclude that the language on the tombstones may have been fighting words, that is, they may have incited violence. Whether Officer Mason was mistaken in his belief does not strip away his qualified immunity. The Court's conclusion comports with Seventh Circuit case law, which instructs: "In cases involving the issue of whether probable cause existed to support an arrest, the case should not be permitted to go to trial if there is any reasonable basis to conclude that probable cause existed." *Thompson v. Wagner*, 319 F.3d 931, 935 (7th Cir. 2003) (internal quotations and citation omitted); *see also Sornberger v. City of Knoxville*, 434 F.3d 1006, 1013 (7th Cir. 2006) ("doctrine of qualified immunity 'gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law.'").

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED AND FILED JANUARY 17, 2006

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Case No. 04 C 7005

JEFFREY R. PURTELL and VICKI A. PURTELL,

Plaintiffs,

v.

BRUCE MASON, in his individual capacity,

Defendant.

MEMORANDUM OPINION AND ORDER

AMY J. ST. EVE, District Court Judge:

Plaintiffs Jeffrey R. Purtell and Vicki A. Purtell filed a two-count Complaint against Defendant Village of Bloomingdale Police Officer Bruce Mason alleging that he violated their First and Fourth Amendment rights to the United States Constitution. *See* 42 U.S.C. § 1983. Before the Court is Officer Mason's Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56(c). For the following reasons, the Court grants in part and denies in part Officer Mason's motion.

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BACKGROUND

I. The Purtells

The Purtells resided at 165 Jackson Lane, in the Village of Bloomingdale, Illinois for approximately 13 years prior to the incident giving rise to the present lawsuit. (R. 21-1, Def.'s Local Rule 56.1 Stmt., ¶ 5.) In October of 1995, the Purtells purchased a recreational vehicle ("RV") that measured 38 feet in length and over 12 feet in height. (*Id.* ¶ 6.) In January of 2001, Jeffrey Purtell delivered a letter to his neighbors informing them that due to his family's financial and medical problems, he needed to park his RV at his residence. (*Id.*; R. 25-1, Pl.'s Addl. Stmt. Facts, ¶ 4.)

II. Village of Bloomingdale Ordinance

Betty and Jim Garbarz have resided at 169 Jackson Lane, directly south of the Purtells' home, since the late 1980s or early 1990s. (R. 21-1, Def.'s Stmt. ¶ 7.) Jeffrey Purtell sent a letter to Jim Garbarz dated January 21, 2001 regarding the parking of the Purtells' RV at their residence. (*Id.* ¶ 8.) Jim Garbarz testified that he had no objection to the Purtells parking their RV on their property for a few months, but that he grew unhappy when the Purtells had parked the vehicle on their property off and on for over a year. (*Id.* ¶ 9.) Eventually, Jim Garbarz called the Village of Bloomingdale to complain about the presence of the RV on the Purtells' property. (*Id.*)

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At all times relevant to this case, Diane Lesner, her husband Robert, and two children resided at 161 Jackson Lane, directly north of the Purtells' residence. (*Id.* ¶ 12.) In August of 2002, some of the Purtells' neighbors, including Diane Lesner and the Garbarzs, began to support the passage of a Village of Bloomingdale ordinance that would prohibit the parking of recreational vehicles on residential property. (*Id.* ¶¶ 13, 14.) On August 17, 2002, the Village of Bloomingdale published a Notice Of Public Hearing indicating that on September 3, 2002, the Plan Commission of the Village of Bloomingdale would conduct a public hearing and meeting concerning the proposed ordinance. (R. 25-1, Pl.'s Stmt. ¶ 13.) A Plan Commission meeting also took place on October 1, 2002. (*Id.*) The Purtells attended these meetings and expressed their opposition to the ordinance, whereas the Garbarzs and Diane Lesner expressed their support for the ordinance. (R. 21-1, Def.'s Stmt. ¶ 14.) In November of 2002, the Village Board of Bloomingdale passed an ordinance prohibiting the parking of RVs on residential property. (*Id.* ¶ 15; R. 25-1, Pl.'s Stmt. ¶ 16.)

III. The Tombstones

In mid-October of 2002, Jeffrey Purtell erected several "tombstones" on his front lawn as Halloween decorations, some of which made specific reference to neighbors who supported the passage of the RV ordinance. (R. 21-1, Def.'s Stmt. ¶ 16.) One tombstone referenced Jim Garbarz and stated:

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Here Lies Jimmy,
The OlDe Towne IdioT
MeAn As sin even withouT his Gin
No LonGer Does He wear
That sTupiD Old Grin . . .
Oh no, noT where
they've sent Him!
— 1690 –

(*Id.* ¶ 20.) Jeffrey Purtell admits that the "Jimmy" tombstone referred to Jim Garbarz and by making the tombstone, he was attempting to show Jim Garbarz how ignorant he was regarding the RV ordinance. (*Id.* ¶ 21.)

Another tombstone, directed at Diane Lesner, stated:

– 1610 –
Dyean was Known for Lying
So She was fried.
Now underneath these daises
is where she goes crazy!!

– 1680 –
Roses are red.
Violets are blue
There's stiLL some space
Waiting for you!

(*Id.* ¶¶ 24, 25.)

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Jeffrey Purtell intended for another tombstone to reference Betty Garbarz as a protest against her attitude of "her lying to me, her dissatisfaction, her distrust of the entire situation." (*Id.* ¶¶ 26, 27.) This tombstone stated:

> BeTTe wAsN'T ReADy,
> BuT here she Lies
> Ever since that night she DieD.
> 12 feet Deep in this trench . . .
> Still wasn'T Deep enough
> For that wenches Stench!
> – 1690 –

(*Id.*)

Furthermore, the Purtells placed another tombstone in their yard about their neighbor, John Berka, stating:

> Old John Burkuh
> Said he didn'T give a care
> So They buried hiM
> aLive uP To his hair.
> He couLdn'T breath
> So now we're relieved
> Of ThaT NasTy oLd jerk!
> – 1888 –

(R. 25-1, Pl.'s Stmt. ¶¶ 21, 22, 23.) John Berka favored the proposed RV ordinance and voiced his opinion at one of the Plan Commission meetings. (*Id.* ¶¶ 17, 20.)

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Betty Garbarz first observed the tombstones in October of 2002 and called the Bloomingdale police because she believed that the Purtells were publicly ridiculing her in retaliation for her support of the RV ordinance. (R. 21-1, Def.'s Stmt. ¶¶ 28, 30.) The "Jimmy" tombstone also offended Jim Garbarz and he testified at his deposition that he construed the tombstone to mean that one of the Purtells would do something to injure or kill him. (*Id.* ¶¶ 35, 36.) When Diane Lesner saw the tombstones in the Purtells' front yard, she also became upset. (*Id.* ¶ 40.) Within a day or two of reading the tombstones, Jim Garbarz called the Bloomingdale Police Department. (*Id.* ¶ 45.)

IV. Events of October 18, 2002

Meanwhile, on October 18, 2002, Bloomingdale police officers visited Jeffrey Purtell at his home and one of the officers, Sergeant Stick, told Purtell that his neighbors had flagged down the police and told them that they were disturbed by "some of the verbiage" on the tombstones. (*Id.* ¶ 47.) At that time, the police officers asked Jeffrey Purtell to take down the tombstones, but he refused. (*Id.* ¶ 48.) Jeffrey Purtell told the police that his right of freedom of speech protected the tombstones, but he agreed to cover the names on the tombstones with duct tape and consequently did so. (*Id.* ¶ 49.) After that, the police officers told Betty Garbarz that the Purtells would place tape over the names and take down the tombstones after Halloween, asking her to "please let it go." (*Id.* ¶¶ 51, 52.)

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V. Events of November 6, 2002

On November 6, 2002, Betty Garbarz called the police because Halloween had passed, the tombstones were still in place, and the duct tape was off of her husband's name on the "Jimmy" tombstone. (*Id.* ¶ 53.) That same day, Defendant Officer Bruce Mason was dispatched in response to Betty Garbarz's call, along with his back-up, Officer Hill. (*Id.* ¶ 55.) Upon arrival, Officer Mason observed the tombstones. (*Id.*)

Officers Mason and Hill spoke to Jim Garbarz and Diane Lesner who told him that they had an ongoing problem with the Purtells because of the tombstones and that the neighbors took the tombstones "as a threat, and they were alarmed and disturbed by that, the fact that their name was on a tombstone." (*Id.* ¶ 56, Ex. E at 25-26.) Officer Mason also testified that the neighbors believed that Jeffrey Purtell "was angry with them because they went to the Village Board, complaining about his RV parked in front of his home" and "they were afraid that he was planning some type of revenge for that." (*Id.* ¶ 57, Ex. E at 30-31.) Furthermore, Officer Mason testified that the neighbors feared violence and told him they had previously argued with Jeffrey Purtell. (*Id.*, Ex. E at 40.) The neighbors also told Officer Mason that on a prior occasion, the Bloomingdale police had spoken to Jeffrey Purtell about the tombstones and that afterwards, Purtell placed tape over the names. (*Id.* ¶ 66.)

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Diane Lesner spoke to Officers Hill and Mason on November 6, 2002 telling them that they wanted the tombstones taken down because they were upsetting to her son Jimmy, who thought the "Jimmy" tombstone referred to him. (*Id.* ¶¶ 59-61.) Diane Lesner told one of the police officers that she wanted to press charges. (*Id.* ¶ 65.) The officer responded that she could press disorderly conduct charges. (*Id.*)

Officers Hill and Mason also spoke with Jeffrey Purtell on November 6, 2002.[1] (*Id.* ¶ 68.) Officer Mason explained to Purtell that the neighbors were upset about the tombstones and the fact that the tape had fallen off one of the tombstones revealing the name. (*Id.*) Purtell informed Officer Mason that he was upset with his neighbors and directed the tombstones at them not as threat, but because of the RV ordinance. (*Id.* ¶ 69.) Officer Mason testified that he then asked Jeffrey Purtell to take down the tombstones to keep the peace in the neighborhood, but Purtell refused to do so. (*Id.* ¶ 71, Ex. E at 36-37.) Meanwhile, as Purtell was covering the name on the tombstone, the neighbors came out to speak with the police. (*Id.* ¶ 72.) Thereafter,

1. Plaintiffs contend that it is unclear whether Officer Mason talked with the neighbors first or Jeffrey Purtell first upon arriving in their neighborhood on November 6, 2002. (R. 21-1, Def.'s Stmt. 57.) Plaintiff's contention is irrelevant because Officer Mason heard from both sides before temporarily arresting Purtell. (*Id.*, Ex. D, Betty Garbarz Dep. at 49-55, Ex E. Bruce Mason Dep. at 33-46, Ex. F, Jim Garbarz Dep. at 39-44, Ex. G., Jeffrey Hill Dep, at 14-27, Ex. H, Diane Lesner Dep. at 36-38).

the police advised Purtell that the neighbors wanted him arrested because of the words on the tombstones. (*Id.*) Then Robert Lesner arrived home and he and Purtell began to argue loudly after which the police had to physically separate them. (*Id.* ¶ 73.)

Officer Mason then told Jeffrey Purtell that he wanted him to take down the tombstones to avoid arresting him on a complaint for disorderly conduct. (*Id.* ¶ 79.) Jeffrey Purtell refused to take down the tombstones. (*Id.* ¶ 80.) Consequently, Officer Mason handcuffed him. (*Id.*) After being in handcuffs for a "couple" or a "few" minutes, Purtell stated that he would remove the tombstones. (*Id.* ¶ 81.) Officer Mason then removed the handcuffs from Purtell. (*Id.*) After removing the handcuffs, one of the police officers spoke to the neighbors who agreed not to press charges against Purtell if he removed the tombstones. (*Id.* ¶ 82.) Purtell then removed the tombstones in the presence of the police. (*Id.*)

SUMMARY JUDGMENT STANDARD

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A genuine issue of material fact exists only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The party seeking summary judgment has the burden of establishing the lack of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). In determining whether a genuine issue of material fact exists, the Court construes the facts in a light most favorable to the non-moving party and draws all reasonable inferences in favor of that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255, 106 S.Ct. 2505. The existence of a factual dispute alone is not sufficient to defeat a summary judgment motion, instead the non-moving party must present definite, competent evidence to rebut the summary judgment motion. *Butts v. Aurora Health Care, Inc.*, 387 F.3d 921, 924 (7th Cir.2004).

ANALYSIS

I. First Amendment Claim

A. Fighting Words

In Count I of the Complaint, the Purtells contend that Officer Mason violated their First Amendment rights when he requested that they remove the tombstones from their property. Officer Mason asserts that the language on the tombstones did not amount to an expression of ideas, but instead constituted "fighting words" that were not protected speech under the First Amendment.

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The First Amendment protects the freedom of speech and expressive conduct and generally prevents the government from proscribing such activities. *RAV v. City of St. Paul, Minnesota*, 505 U.S. 377, 382, 112 S.Ct. 2538, 2542, 120 L.Ed.2d 305 (1992). First Amendment protections of speech and expressive conduct, however, are not absolute. *Virginia v. Black*, 538 U.S. 343, 358, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003) (Virginia's statute banning cross-burning with intent to intimidate "does not run afoul of the First Amendment"). The Supreme Court has held that fighting words—"those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction"—are not protected speech under the First Amendment. *Id.* (quoting *Cohen v. California*, 403 U.S. 15, 20, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971)). To determine whether speech or expressive conduct constitute "fighting words," the Court considers the language in light of the circumstances in which they are uttered and if the words are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Texas v. Johnson*, 491 U.S. 397, 409, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S.Ct. 766, 86 L.Ed. 1031 (1942)); *see also Brandenburg v. Ohio*, 395 U.S. 444, 447-48, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (speech not protected if it incites imminent illegal activity).

Considering the language in light of the circumstances surrounding the tombstones, Officer

Mason has failed to establish, as a matter of law, that the language on the tombstones constitutes "fighting words." In determining whether language constitutes fighting words, the Court must examine if the words would incite an "immediate breach of the peace" or are "likely to provoke violent reaction." Here, the testimony in the record reveals that the neighbors thought the language on the tombstones constituted threats and that they were alarmed and disturbed by their names on the tombstones. Also, Jim Garbarz testified that he thought that the tombstones meant that one of the Purtells was going to do something to injure or kill him. There is no evidence in the record, however, that the language on the tombstones would incite the neighbors to react violently or in retaliation and any such inference is a question for the jury. *See Wallace v. Jaffree*, 472 U.S. 38, 76, 105 S.Ct. 2479, 2489, 86 L.Ed.2d 29 (1985) (O'Connor, J., concurring) (question of whether fighting words are "likely to provoke the average person to retaliation" is mixed question of fact and law). Accordingly, there is a genuine issue of material fact whether the language on the tombstones constitutes fighting words, and thus is excepted from First Amendment protections.

B. Qualified Immunity

Nevertheless, Officer Mason contends that he is protected from this civil lawsuit by qualified immunity. In general, qualified immunity shields government officers performing discretionary functions from civil litigation. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818,

102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). "As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). When determining whether qualified immunity shields a police officer from a Section 1983 action, the Court undertakes a two-part inquiry. *Jones v. Wilhelm*, 425 F.3d 455, 460 (7th Cir.2005). The Court's first inquiry is whether the facts, viewed in the light most favorable to the Purtells, show that Officer Mason violated a constitutional right. *Id.* (citing *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). If the alleged facts state a constitutional violation, the Court must determine whether the constitutional right was clearly established at the time of Officer Mason's conduct. *Wernsing v. Thompson*, 423 F.3d 732, 742 (7th Cir.2005) (citing *Saucier*, 533 U.S. at 201, 121 S.Ct. 2151).

The Court turns to the second qualified immunity inquiry, because, as discussed above, there is a genuine issue of material fact whether the language on the tombstones constitutes protected speech. Under the second qualified immunity prong, it is the Purtells' burden to establish that their First Amendment right was "clearly established." *Id.* To do so, the Purtells "must demonstrate either that a court has upheld the purported right in a case factually similar to the one under review, or that the alleged misconduct constituted an obvious violation of a constitutional right." *Id.*

The Purtells do not set forth an analogous case concerning the right to freedom of speech applying factually similar circumstances, thus the Court looks to whether Officer Mason's conduct "constituted an obvious violation of a constitutional right." *See id.*; *see also Nabozny v. Podlesny*, 92 F.3d 446, 456 (7th Cir.1996) ("liability is not predicated upon the existence of a prior case that is directly on point"). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *See Saucier*, 533 U.S. at 202, 121 S.Ct. 2151; *see also Brosseau v. Haugen*, 543 U.S. 194, 125 S.Ct. 596, 599, 160 L.Ed.2d 583 (2004) (per curiam). This inquiry is two-fold: (1) whether the plaintiff's constitutional rights were clearly established; and (2) whether a reasonable police officer in Officer Mason's position would have understood that his actions were unlawful. *See Saucier*, 533 U.S. at 202, 121 S.Ct. 2151; *Anderson v. Creighton*, 483 U.S. 635, 640-41, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987).

There is no doubt that a government officials' suppression of speech implicates the First Amendment. *See Texas v. Johnson*, 491 U.S. at 409, 109 S.Ct. 2533; *see also Multimedia Holdings Corp. v. Circuit Court of Florida, St. Johns County*, 544 U.S. 1301, 125 S.Ct. 1624, 1626, 161 L.Ed.2d 590 (2005) (governmental pressure or coercion against free speech unconstitutional). Accordingly, the Court addresses whether a reasonable police officer in Officer Mason's position would have understood that his actions were unlawful. Because this

is an objective test, the Court does not consider Officer Mason's subjective beliefs. *Anderson v. Creighton*, 483 U.S. at 641, 107 S.Ct. 3034; *see also Hammond v. Kunard*, 148 F.3d 692, 696-97 (7th Cir.1998) (subjective factors not ignored because information possessed by officer relevant to inquiry). Instead, the Court looks to the fact-specific, but objective question of whether a reasonable officer could believe that Officer Mason's actions were lawful in light of clearly established law and the information Officer Mason possessed. *Anderson v. Creighton*, 483 U.S. at 641, 107 S.Ct. 3034; *Doyle v. Camelot Care Ctrs., Inc.*, 305 F.3d 603, 620 (7th Cir.2002) (question turns on "objective legal reasonableness" of officer's conduct). To determine if an officer acts in an objectively reasonable manner, the Court examines whether police officers of reasonable competence could disagree as to the legality of Officer Mason's conduct. *Malley v. Briggs*, 475 U.S. at 341, 106 S.Ct. 1092. If so, Officer Mason is entitled to qualified immunity. *Id.*

Thus, whether qualified immunity shields Officer Mason turns on the objective reasonableness of his actions during his interaction with Jeffrey Purtell, as assessed in light of Jeffrey Purtell's right to freedom of speech. Evidence in the record reveals that before Officer Mason asked Jeffrey Purtell to take down the tombstones, Officer Mason was aware that the neighbors and Jeffrey Purtell were having a dispute over the RV ordinance. In fact, Jeffrey Purtell told Officer Mason that he had put up the tombstones because of the neighbors' support of the RV ordinance. On the other hand, Officer Mason testified at his deposition that he

did not understand that the tombstones were part of a political protest, and that Jeffrey Purtell did not tell him that he was protesting a law. (Ex. E., Bruce Mason Dep. at 47, 70-71.) Officer Mason also testified that based on the totality of the circumstances, he perceived the tombstones as a threat, not a protest. (*Id.* at 71.) Based on this evidence, there is a genuine issue of material fact as to whether Officer Mason acted in an objectively reasonable manner when he asked Jeffrey Purtell to take down the tombstones based on the circumstances he confronted on November 6, 2002. As such, the Court denies Officer Mason's Motion for Summary Judgment as to the Purtell's First Amendment claim.

II. Fourth Amendment Claim

In Count II of the Complaint, the Purtells bring a false arrest claim pursuant to the Fourth Amendment. *See* 42 U.S.C. § 1983. To recover under Section 1983, the Purtells must prove that Officer Mason deprived Jeffrey Purtell of a federal right while acting under the color of state law. *Pepper v. Village of Oak Park*, 430 F.3d 805, 808 (7th Cir.2005). The existence of probable cause to arrest precludes a Section 1983 lawsuit for false arrest. *Morfin v. City of East Chicago*, 349 F.3d 989, 997 (7th Cir.2003) (citations omitted). Thus, the Court turns to the legal bases for Jeffrey Purtell's arrest.

"[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Illinois v. Gates*, 462 U.S. 213, 243 n. 13, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). To have

probable cause for an arrest, a police officer must reasonably believe, in light of the facts and circumstances within his knowledge at that time, that the suspect has committed or was committing a crime. *United States v. Parra*, 402 F.3d 752, 763-64 (7th Cir.2005) (citations omitted); *see also Gates*, 462 U.S. at 232, 103 S.Ct. 2317 (probable cause "turn[s] on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules").

The Illinois disorderly conduct statutes reads in pertinent part: "A person commits disorderly conduct when he knowingly does any act in such unreasonable manner as to alarm or disturb another and to provoke a breach of the peace." 720 ILCS 5/26-1(a)(1). The intent of the disorderly conduct statute is to guard against the invasion of the right of others not to be harassed without justification. *People v. Redwood*, 335 Ill.App.3d 189, 194, 269 Ill.Dec. 288, 780 N.E.2d 760 (2002). As the Seventh Circuit explains "the emphasis of the statute is upon the tendency of the conduct to disturb others and to provoke disruptions of public order upon the unreasonableness of the activity when viewed in the context of the surrounding circumstances." *Gower v. Vercler*, 377 F.3d 661, 670 (7th Cir.2004) (quotations and citations omitted).

Here, the Purtells make no argument concerning Officer Mason's qualified immunity in the context of their Fourth Amendment claim. Nevertheless, as discussed above, before Officer Mason arrested Jeffrey

Purtell for disorderly conduct, the Purtells' neighbors told Officer Mason that they viewed the language on the tombstones as a threat and that they were afraid that Purtell was planning some type of revenge for their support of the RV ordinance. In addition, Diane Lesner told the police officers that she wanted to press charges against Jeffrey Purtell. Although Jeffrey Purtell told Officer Mason that he did not erect the tombstones as a threat, shortly thereafter, Purtell and his neighbor Robert Lesner began to argue after which the police had to physically separate the two men.

Under these circumstances, Officer Mason could reasonably believe that Jeffrey Purtell was acting in a manner that alarmed or disturbed his neighbors and provoked a breach of the peace. As the record reveals, the Purtells' neighbors felt threatened by Purtell and were disturbed that their names were on the tombstones. Furthermore, Jeffrey Purtell's altercation with his neighbor, Robert Lesner, supports the conclusion that Purtell was provoking a breach of the peace. Accordingly, Officer Mason had probable cause to arrest Jeffrey Purtell, and thus the Purtells' Fourth Amendment claim must fail.

Appendix D

CONCLUSION

For these reasons, the Court grants in part and denies in part Officer Mason's Motion for Summary Judgment.

Date: January 17, 2006

ENTERED

s/ Amy J. St. Eve
AMY J. ST. EVE
United States District Court Judge